Temp-Rite Air Conditioning Corp. *and* **Naveed Zafar.** Case 29–CA–17530

December 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

On March 22, 1995, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions with a supporting brief,[1] and the General Counsel filed cross-exceptions and a brief in support.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found, inter alia, that the Respondent violated Section 8(a)(1) of the Act by discharging employee Naveed Zafar on March 18, 1993. We agree with the judge.

As more fully set forth by the judge, the Respondent entered into a union contract in order to obtain more business.[3] The Respondent told Zafar that his pay rate would be lower under the contract than it was before. The contract provides that it is not to be interpreted so as to reduce the wages of any employee. Thus, when Zafar objected to the pay cut, he was voicing a complaint that was based on the contract. Zafar's objection was therefore protected concerted activity.[4] In response, the Respondent's owner, Ralph Bussola, told Zafar that if he did not like it, he could quit. After Zafar received his first reduced paycheck under the new contract, he protested to Bussola about the reduction in his wages from $16 to $14.98 per hour. Bussola again responded that if Zafar did not like it, he could leave.[5] These statements by Bussola were found by the judge to violate Section 8(a)(1). We agree.[6]

Following these exchanges between Zafar and Bussola, on March 18, Bussola informed Zafar that he was being laid off. Bussola said that Zafar was not happy with the job and that he should go to the Union, which might be able to get him other work.

Zafar complained to the Union about his reduction in pay and the layoff. The Union informed Bussola that, under the contract, the Respondent was required to give written notice regarding a discharge or layoff. The Union also told Bussola that, under the contract, he could not reduce Zafar's previously existing wage rate.

The Respondent replied to the Union, by a letter dated March 23, that it had discharged Zafar because he had been found sleeping in a company van on March 11; that he had been found eating lunch at 2 p.m. when his helper was working; and that, on March 17, he left the worksite and could not be found by the foreman. Zafar, however, was reinstated and he reported for work on March 30. At this time, Zafar was given a copy of the March 23 letter that the Respondent had sent to the Union. This was the first time that he was provided the asserted reasons for his termination. Zafar denied the alleged misconduct.

From these facts, we find that the General Counsel showed that Zafar had continually complained of the wage reduction, i.e., his perceived rights under the collective-bargaining agreement. Bussola displayed animus toward these protected activities, as evidenced by his statements found here to violate Section 8(a)(1). The General Counsel thus made a prima facie case that the Respondent discharged Zafar for engaging in protected activity.

The Respondent's defense, i.e., that it discharged Zafar for misconduct, was first expressed to the Union several days after Zafar's discharge. This reason was not given to Zafar until after his reinstatement. In these circumstances, we find that the Respondent's assertion that Zafar had engaged in misconduct was an afterthought. Whether or not the misconduct in fact occurred, we find that it was used as a pretext and was not the real reason for the discharge. We therefore find that the Respondent did not fulfill its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to show that it would have discharged Zafar even in the absence of his protected activity.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). All dates are 1993 unless otherwise indicated.

[3] There is no finding that this contract was unlawful.

[4] *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

Zafar also protested his being subjected to the union-security clause. Although this protest may not have been reasonably based on the contract, this does not diminish the protected character of the other protest. As noted infra, it was the other protest (the one about wages) that persisted.

[5] Bussola testified similarly that he told Zafar that if he was not happy with the Respondent's decision he could not force Zafar to continue working.

[6] *Stoody Co.*, 312 NLRB 1175, 1181 (1993); *Rolligon Corp.*, 254 NLRB 22 (1981).

We also agree with the judge that the Respondent further violated Section 8(a)(1) on April 7 by discharging Zafar for the second time.

Zafar was reinstated on March 30. On March 31, however, without the Respondent's required permission, Zafar sold a valuable coil from a disassembled air-conditioner for scrap (for $42). The coil may actually have been worth up to $4000 to the Respondent.[7] Around the same time, during the period from Zafar's March 30 reinstatement through his April 7 second discharge, Bussola repeatedly but unsuccessfully attempted to have Zafar sign a letter, prepared by the Respondent, in which Zafar would consent to having his pay reduced from $16 to $14.98 per hour—despite the above-contractual provision expressly prohibiting that reduction and protecting Zafar's existing pay rate.

Finally, on April 7, after Zafar unsuccessfully attempted to give Bussola the $42 proceeds from the unauthorized sale of the coil for scrap, Bussola again unsuccessfully attempted to have Zafar sign the letter consenting to the reduction in his pay. Bussola then told Zafar that "he can't go on like this,"[8] and again discharged Zafar. At no time during this conversation, however, did Bussola mention anything to Zafar about his unauthorized sale of the coil as a reason for his discharge. Indeed, as seen, Zafar's sale of the coil occurred a full week before his discharge—during which week Bussola, however, repeatedly but unsuccessfully attempted to have Zafar sign the letter of consent to the contractually prohibited pay cut.

The judge found, and we agree, that the General Counsel made a prima facie case that Zafar was also discharged the second time for engaging in protected concerted activity. Thus, Zafar continued to assert rights under the union contract; and Bussola continued his coercive effort to induce Zafar to forfeit those protected rights up until his discharge.

The judge found that the Respondent had a mixed motive for discharging Zafar. It acted partly in retaliation for Zafar's protected activity and partly for a legitimate reason, i.e., Zafar's violation of a company policy concerning scrap parts. Ultimately, the judge found that if Bussola had not feared that Zafar would prevail in protecting (and recovering) his wages, he would not have discharged Zafar for selling the coil without permission. The judge thus found that the Respondent had not rebutted the General Counsel's prima facie case and that the discharge was unlawful.

We agree. Although Zafar's selling the air-conditioning coil could theoretically have been a sufficient cause for discharge, the Respondent has not shown that it would have fired him had he not engaged in protected activity. Thus, for a full week after Zafar's sale of the coil, Bussola took no disciplinary action against Zafar for that conduct. Instead, Bussola continued repeatedly but unsuccessfully to attempt to have Zafar sign the letter of consent to the contractually prohibited pay cut, culminating in Zafar's discharge. Significantly, when he discharged Zafar, Bussola, exasperated, told Zafar that "he can't go on like this," but did not make any reference to Zafar's sale of the coil. This shows that the Respondent was prepared to forgive Zafar's violations of company policy if he had agreed to waive his rights. Otherwise, Bussola's last minute effort would have been a meaningless act. We find that Respondent has thus failed to show that it would have fired Zafar even in the absence of his protected activities. Accordingly, we agree with the judge that Zafar's discharge violated Section 8(a)(1).

We also agree with the judge's recommendation that Zafar's backpay should be reduced by an amount equal to the value of the air-conditioner coil that he sold as salvage without the Respondent's permission. In this regard, we note that the reduction of backpay was not a "punishment" of Zafar, as viewed by our dissenting colleague. Rather, we find that it was compensation for property improperly taken by Zafar from Respondent. Thus, the judge's remedy was not outside the bounds of reasonable judgment. In apparent recognition of this, no party has excepted to it. In these circumstances, we do not reach out to reject the remedy.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Temp-Rite Air Conditioning Corp., Long Island City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or threatening to discharge employees because they express opposition to unionization or because they engage in other protected concerted activity for mutual aid and protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Naveed Zafar full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges previously enjoyed.

(b) Make Naveed Zafar whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

[7] We do not adopt the judge's speculation that Zafar did not seek permission to sell the coil because Zafar was still angry at the reduction in his wage rate.

[8] Bussola did not deny that he made this statement.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Long Island City, New York facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 6, 1993.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER BROWNING, dissenting in part.

I agree with my colleagues in all respects except that I do not adopt that part of the judge's recommended remedy that would reduce Charging Party Zafar's backpay by an amount equal to the asserted value of the salvaged air-conditioner coil that he sold without permission. Although I do not condone any misconduct on Zafar's part, I find that any compensation that Zafar may owe to the Respondent is a private matter between them, and is not, in any event, a proper deduction from backpay owed by an employer to an employee as a remedy for a discharge found to be unlawful under the National Labor Relations Act.

Moreover, the record here establishes, and my colleagues and I join in finding, that Zafar was not discharged for selling the coil, but rather for ultimately refusing the Respondent's repeated attempts to have him sign the letter of consent to a contractually prohibited pay cut. Thus, we have necessarily concluded that the Respondent would not have disciplined Zafar solely because he sold the coil without permission. It is speculative at best for my colleagues to try to determine in these circumstances whether the Respondent would nevertheless have required Zafar to compensate the Respondent. The Board certainly cannot and should not attempt to put itself in the shoes of the Respondent and impose a punishment on an unlawfully discharged employee—a punishment that the Respondent itself did not impose on Zafar in the first instance. Neither the judge nor my colleagues have cited precedent in support of such an extraordinary modification to the Board's standard make-whole remedy for unlawful discharge, and I would not grant it.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, or threaten to discharge, or otherwise discriminate against Naveed Zafar or any of you for expressing opposition to unionization or for engaging in other concerted activity for mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Naveed Zafar full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Naveed Zafar whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Naveed Zafar and WE WILL,

within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

TEMP-RITE AIR CONDITIONING CORP.

Kathy Drew King, Esq., for the General Counsel.
Timothy R. Hott, Esq. (Hott & Margolis), for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on January 10 and 11, 1994. The charge against the Temp-Rite Air Conditioning Corp. (the Company), in Case 2–CA–17530, was filed by Naveed Zafar on July 22, 1993. Another charge was filed by Zafar on the same date against the International Union of Operating Engineers, Local 295, AFL–CIO. A consolidated complaint was issued on October 1, 1993, and this alleged various violations against the Employer and the Union.

At the opening of the hearing the complaint was amended to delete certain 8(a)(2) allegations against the Company and the allegations against the Union. This was the result of settlement agreements that were approved by the Regional Director on January 4, 1995.[1] Accordingly, the only allegations remaining in the case were that the Company (1) threatened Zafar with discharge if he refused to remain or become a member of the Union; (2) that it discharged Zafar on March 18, 1993, because of his refusal to join the Union and because he complained about not receiving the contractual wage rate for an "A" mechanic; (3) that it imposed less desirable working conditions on Zafar on his reinstatement on March 30, 1993; and (4) that it again discharged him on April 7, 1993, for all the foregoing reasons plus the additional reason that he filed a grievance with the Union regarding his discharge on March 18, 1993.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a New York corporation, with its facility in Long Island City, New York, admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] In essence, these settlement agreements required the Company to cease soliciting employees to join the Union, to terminate a collective-bargaining agreement between the Company and the Union, and to withdraw and withhold recognition from the Union. Additionally, the Union and the Company were required to reimburse employees for any dues and initiation fees paid to the Union pursuant to the canceled collective-bargaining agreement.

II. ALLEGED UNFAIR LABOR PRACTICES

The Company is engaged in the business of installing air-conditioning systems. In the course of its business, it would be contracted to remove an air-conditioning system from an existing building and to install a new air-conditioning system with attendant duct work. Its business, to a large extent, was with already standing commercial buildings located in New York City. The owner of the Company is Ralph Bussola who directly supervises the people he employs. The only other company supervisor is Mike Arata, who, in addition to being a foreman, also does layout work. Until February 1993, the Company had no relationship with any union.

Naveed Zafar was originally hired as a helper in 1988. Zafar was hired because his wife was an old friend of Bussola and his family. And until the events described herein, the two families were on friendly terms. Sometime after 1988, Zafar learned how to be a mechanic and his rate of pay was increased, in increments, from $8 to $16 per hour.

The Company points out that in the fall of 1992 Zafar expressed his displeasure with the amount of money he was earning whereupon Bussola gave him an opportunity to demonstrate if he was capable of doing layout work which involved making blueprints. Bussola testified that Zafar proved to be incapable of performing this type of work, albeit he offered to allow Zafar to come in on his own time, to learn how to do it. The upshot was that Zafar returned to doing mechanic's work and continued to be paid at the rate of $16 per hour. However, according to Bussola, Zafar's attitude and job performance began to suffer after this transaction.

Both Zafar and Bussola agree that before February 1993, the Union had approached the Company and its employees on various occasions at various jobsites where they were working. According to Bussola, after some initial contacts, he instructed Foreman Arata to talk to the employees about the Union and find out if they were in favor of joining. Bussola states that he decided to enter into a contract with the Union because he felt it would enable him to get more business.

On February 4, 1993, Bussola executed a contract whereby he agreed to be bound by an industrywide collective-bargaining agreement between the Union and the Association of Master Refrigeration and Air Conditioning Contractors, Inc. This agreement had a term from April 1, 1990, to May 1993 and covered the employees of Temp-Rite, including Arata and Zafar. (There were about eight or nine people employed by the Company at this time.) The agreement set the wage rates as $20.38 for a mechanic A and $14.98 for a mechanic B. At article XIV, the contract provides that the agreement shall not be interpreted to "effectuate a reduction in the wage rate of any worker existing at the time this Agreement is signed, nor in any way to decrease or minimize the benefits, terms, or conditions of employment which prevail at the time this Agreement is signed." As noted above, this agreement was nullified by the settlement agreements approved by the Regional Director on December 31, 1994.

On Saturday, February 6, 1993, Bussola arranged to talk to each of his employees at the shop and to advise them that he had signed a contract with Local 295. He, therefore, spoke to Zafar, told him that he had executed a contract in the hopes of getting more business and that as a consequence of the contract's terms, Zafar would have his wage rate reduced to $14.98 per hour. When Zafar said that he did not

want to have his wage rate reduced and did not want to join the Union, Bussola told him that the other benefits, including pension and welfare benefits, would more than make up for the wage reduction. Zafar testified that he continued to express his opposition and that Bussola finally told him that if he did not like it, he could leave. Bussola's testimony regarding this meeting was not particularly different from the testimony of Zafar. Bussola states that he told Zafar that if he was not happy with the Company's decision, he could not force Zafar to continue working.

Although signing a union card and remitting a $100-initiation fee to the Union on February 8, 1993, Zafar, after receiving his first paycheck under the new contract, again complained to Bussola in mid-February. Zafar states that he told Bussola that he was not happy with the reduction in his wages to which Bussola responded by again saying that if he did not like it, he could leave. Zafar claimed that he should be paid the mechanic A rate under the contract and Bussola disagreed. Bussola testified that when he rejected Zafar's request for the mechanic A rate he told Zafar that "this is America," that he was not going to hold Zafar, that Zafar could do whatever he liked and that he could look for other employment.

On March 18, 1993, Bussola told Zafar that he was being laid off. Among other things, both sides agree that Bussola said that Zafar was not happy with the job and that Zafar should go to the Union which might be able to get him other work.

Zafar did go to the Union and complained about his layoff and the reduction in his pay rate to Peter Clemenza, a business agent. Clemenza, in turn, contacted the Company and told Bussola that under the agreement, the Company was required to submit written notice regarding a discharge or layoff. He also told Bussola about Zafar's pay rate complaint and notified the Company that under the contract, the Company could not reduce Zafar's wage rate even though the scale in the agreement called for $14.98 per hour. Although the Company did send a written statement describing its alleged reasons for terminating Zafar, the Union insisted and prevailed in getting Zafar reinstated.[2] This was done on March 30, 1993.

On March 30, 1993, Zafar returned to the shop but was told to report the following day as there was no work for him yet. He was given a copy of the letter that the Company sent to the Union on March 23 and also a letter dated March 29, 1993, which read:

> I Naveed Zafar accept the pay decrease from $16.00 per hour to $14.98 per hour as was offered to me by Temp-Rite Air Conditioning Corp. Furthermore, I agree to pay all tickets received on Temp-Rite Air Conditioning Corp. trucks which I am in possession of. These tickets include but are not limited to the following:
>
> 1. Meters
> 2. Double parking
> 3. Fire hydrant, bus stops, no standing
> 4. Over night parking of vehicle
> 5. Residential parking (no commercial vehicle no matter what the reason is to be parked on residential street including 24 hr. service.
>
> On signing this I accept the above mentioned.

Zafar returned to work on March 31, 1993, and was assigned, with a helper named Carlos, to disassemble a large old air-conditioning unit in a building located at 44th Street in Manhattan, New York. Bussola visited the jobsite that day to give instructions to Zafar. There is, however, a disagreement as to whether Bussola gave Zafar specific instructions to bring the parts of the disassembled unit (including the coil) back to the shop. Bussola says that he did and Zafar says that he did not.

The significance of the above is that a commercial air-conditioning unit consists of a condenser, a compressor, and a coil, the latter being a large aluminum clad copper devise which is used as a heat exchange. An old coil can, in some cases, be reused and therefore can have a resale value in excess of $1000. However, if the coil cannot be reused, it can be sold for the scrap value of the metal, in which case it will fetch under a $100. The witnesses presented by both sides testified that the Company would allow the employees to retain the money from the sale of a coil for scrap, but only if Bussola decided that he could not reuse it. Although Zafar seems to take the position that he was entitled to sell the coil for scrap unless Bussola specifically told him to return it to the shop, Vincent DiStefano and Edward Gilmarten, two employee witnesses, testified that they would never sell a coil for scrap without first getting permission inasmuch as it was company property. Gilmarten, who was called by the General Counsel, estimated that about 70 percent of the old coils are scrapped as junk and that about 30 percent are reused.

In the period after his reinstatement, Zafar was no longer allowed to take a company van home with him at night. He also was not furnished with a separate set of company power tools or with a beeper. As to the van, the evidence showed that Zafar had accumulated a substantial number of parking tickets for which he was responsible and which he had not yet fully reimbursed the Company.[3] Also, in connection with his assignments, there is no evidence that Zafar needed to have his own set of power tools or a beeper, both of which are, in any event, used for the benefit of the Company.

There is no dispute that after Zafar returned to work, and during the period from March 30 to April 6, Bussola on several occasions persisted in trying to get Zafar to sign the letter consenting to pay the parking tickets and to receiving the pay rate reduction. Zafar refused. In this connection, Union Representative Peter Clemenza testified that Zafar had complained to the Union about the reduction in his wage rate. He further testified that he told both Zafar and Bussola that this reduction was contrary to the terms of the collective-bargaining agreement. (Art. XVI.) Thus, despite being on notice that Zafar was asserting that the Company was violating the contract by reducing his wage rate, Bussola nevertheless con-

[2] By letter dated March 23, 1993, the Company notified the Union that it discharged Zafar because he had been found sleeping in the van on March 11; that he was found eating lunch at 2 p.m. when his helper was working; and that on March 17, he left the worksite and could not be found by the foreman. Zafar denied these allegations.

[3] The evidence shows that the Company's policy was that employees who received parking tickets while using company vehicles were required to pay for them or reimburse the Company if it paid for them.

tinued, on more than one occasion after Zafar returned to work, to get him to sign the consent letter.

There is also no dispute that after dismantling the air-conditioning unit, Zafar decided, without first obtaining permission, to sell the coil for scrap and did so on or about March 31, 1993. He sold the coil to Skillman Metal Corp. and received $42 which he split with the helper. Zafar does not claim that he received permission to sell the coil, asserting instead that as he was not given specific instructions to return to the coil to the shop, he assumed that he was free to sell it and retain the money. As noted above, this assertion is contrary to the testimony of the other employee witnesses who testified that the practice in the shop required the employees to affirmatively seek out and obtain permission from Bussola.

Bussola testified that he wanted this coil back because he found a customer to whom he could sell it as part of a job which called for the replacement of an existing air-conditioning unit. (In this respect he states that it was worth between $3000 and $4000.) This was corroborated by Joseph D'Orio, who testified that he was offered the used coil by Bussola as part of a renovation job at a building on 575 Lexington Avenue.

Bussola testified that at the time that he put Zafar on the 44th Street job, he gave him instructions about the work and specifically told Zafar to bring the unit, with the coil, back to the shop. Arata testified that he was told by Bussola to make sure that the unit was brought back to the shop and that he in turn instructed mechanic Vincent DiStefano to go to the site and make sure that the unit was brought back. DiStefano for his part, testified that he told Zafar to bring everything back, albeit he did not specifically mention the coil. He testified that when he arrived at the site, he saw that the coil was still in the room. As noted above, the coil never got back to the shop, having been sold by Zafar for $42.

Zafar was fired again on April 7, 1993, after attempting to tender the $42 to Bussola, and after again being asked to sign the paper agreeing to the pay reduction. He states that Bussola said that "he can't go on like this." Zafar went again to the Union but this time he was told that they could do nothing for him.

Bussola testified that he decided to refire Zafar because of the coil incident and also because Zafar had not been performing his job well for a significant period of time.[4] Bussola states that he did not also fire the helper, because Carlos is a rather simple individual who was easily led astray by Zafar.

III. ANALYSIS

Section 7 of the Act gives employees to right to join and support a labor organization and to engage in other concerted activity for mutual aid and protection. That section of the Act also gives employees the right to refrain from joining a union or engaging in such activities. *Mini-Togs, Inc.*, 304 NLRB 644, 646 fn. 9 (1991). Although the proviso to Section 8(a)(3) permits an employer and a union, having a valid collective-bargaining agreement, to require employees, as a condition of employment, to become and remain members of a union (membership being defined as meeting the financial core of membership),[5] an employee has an absolute right to express his opposition to a union at any time.

In *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), the Supreme Court upheld the Board's doctrine enunciated in *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967), and held that an employee who reasonably and honestly invokes a right derived from a collective-bargaining agreement, is engaged in concerted activity under Section 7 of the Act and cannot be discharged for engaging in such activity. The Court stated:

> The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process—beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity.
>
> . . . .
>
> Moreover, by applying Section 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the Interboro doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the . . . agreement, but also into the entire process envisioned by Congress and the means by which to achieve industrial peace.
>
> Indeed it would make little sense for Section 7 to cover an employee's conduct while negotiating a collective-bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement. [465 U.S. at 831, 835–836.]

In the present case, I am convinced that the Company discharged Zafar for the second time on April 7, at least in part, because, Zafar had expressed his dissatisfaction to the Union about his pay rate and because the Union notified Bussola that the reduction in Zafar's pay rate was contrary to the terms of the recently executed collective-bargaining agreement. Thus, on several occasions, after his reinstatement on March 31, 1993, Bussola asked Zafar to sign a paper consenting to the reduction in his wage rate. Indeed, according to Zafar, this occurred again immediately prior to his discharge on April 7.

Bussola asserts that the principle and precipitating reason for his decision to discharge Zafar on April 7 was because Zafar had sold the copper coil for scrap and did so without permission, contrary to established company policy. In this respect, I believe Bussola to the extent that this was a motivating factor in his decision to discharge Zafar. I also believe that Zafar acted contrary to established company policy by selling the coil without first seeking permission to do so. (I

[4] At an unemployment hearing, Bussola testified that Zafar's discharge on April 7, was caused by his failure to bring back the coil.

[5] In *NLRB v. General Motors*, 373 U.S. 734 (1963), the Supreme Court held that although the proviso to Sec. 8(a)(3) permits conditioning of employment upon union "membership" such membership, may be conditioned only upon payment of union fees and dues.

suspect that Zafar did not seek permission because he was still angry at the reduction in his wage rate.)

In accordance with *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), if the General Counsel makes out a prima facie showing sufficient to support an inference that protected or union activity was a motivating factor in the decision to discharge or take other adverse action against an employee, then the burden shifts to the Respondent to demonstrate that it would have taken the same action in the absence of the protected activity.

Insofar as the discharge on April 7, 1993, I believe we are faced with a mixed motive discharge. That is, the General Counsel has proven, to my satisfaction, that Zafar's discharge was motivated, at least in part, by the Company's fear that the Union would successfully process Zafar's complaint and require it to raise his wage rate to $16 per hour.[6] At the same time I also think that Bussola was motivated, in part, by the fact that Zafar sold the coil for scrap without permission. It is of course impossible for me to know with exactitude what proportion either factor played in Bussola's motivation. Nevertheless, I am inclined to believe that if Zafar had not been stubborn about refusing to sign the letter consenting to the wage reduction, the coil incident, if not overlooked, would not have resulted in the discharge of this long-term employee. In short, I do not believe that in this instance, the Employer has met its burden as set out in *Wright Line*, supra.

Similarly, but to a somewhat lesser extent, I think that the General Counsel has established that Zafar's original discharge on March 18 was also violative of the Act. In this regard, Zafar had initially indicated his reluctance to join the Union which was conflated with his expressed disappointment in having his wage rate reduced. I have little doubt that this disappointment probably reflected itself in a diminution in Zafar's performance which in turn led to a degree of dissatisfaction with his work. On balance, it seems to me that the decision to discharge Zafar was probably motivated by Bussola's annoyance with Zafar's reluctance to go along with Bussola's desire to expand his business by making a contract with the Union.

[6] Zafar's wage rate complaint was raised at a time when the collective-bargaining agreement was still in effect. That contract was, in the eyes of the Employer, the Union, and the employees, a valid agreement. In this connection, I do not think that the subsequent settlement agreement which set aside the contract, vitiates from the fact that at the time of these events, Bussola believed that the contract was valid and made his decision to discharge Zafar, at least in part, on his belief that Zafar was, in effect, attempting to enforce a contract right. Thus, if one looks at motivation as being the critical factor in determining whether a discharge is lawful or unlawful under the NLRA, it seems to me that Bussola's motivation was based, in part, on his belief that Zafar was engaged in activity, which from the Board's perspective would be concerted activity within the definition of the *Interboro* doctrine.

The General Counsel also alleged that the Company, after March 31, imposed less desirable working conditions on Zafar by failing to give him a beeper, by refusing to allow him to take home a company van, and by refusing to provide him with power tools.

With respect to the van, I think that the Company was more than justified in refusing to allow him to bring a van home, inasmuch as Zafar had accumulated numerous traffic tickets. Insofar as power tools, there was no evidence that Zafar was not provided with any tools that were necessary for him to do the work at the 44th Street jobsite. Nor do I conclude that the failure to provide him with a beeper made his job any more onerous.

Finally, the evidence shows that on several occasions after the Company signed the contract with the Union, Bussola, in response to Zafar's complaints about his wage rate, told Zafar that if he was not satisfied, he was free to look for work elsewhere. Statements similar to these were held to be unlawful in *Stoody Co.*, 312 NLRB 1175 (1993), and *Rolligon Corp.*, 254 NLRB 22 (1981).

CONCLUSIONS OF LAW

1. By discharging Naveed Zafar on March 18 and April 7, 1983, the Company has violated Section 8(a)(1) of the Act.
2. By impliedly threatening Zafar with discharge, the Company, has violated Section 8(a)(1) of the Act.
3. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

However, as I have concluded that Zafar did in fact breach company policy by selling a coil for scrap, without first having obtained company permission, I think it is appropriate to reduce the amount of his backpay by the value of the coil. As there was testimony that the coil was worth between $3000 and $4000, I shall presume that the value is $3000.[7] Therefore, unless either party produces evidence to rebut the presumption that the coil was valued at this amount, Zafar's backpay shall be offset by $3000.

[Recommended Order omitted from publication.]

[7] As I have found that the Company is the wrong doer, I am using the lower of the two figures given by Bussola.